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The Chinese Century: An American Judge's Observations of the Chinese Legal System

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THE CHINESE CENTURY: AN AMERICAN JUDGE'S OBSERVATIONS OF THE CHINESE LEGAL SYSTEM

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I. INTRODUCTION

The overwhelming impression reached by anyone making a visit to China at this time is that this country, with its 1.2 billion population and 9.65 million square kilometers of territory, represents the most explosive labor and consumer market in the world. This leads many people to suggest that the first century of the new millennium will be known as “The Chinese Century,” when China becomes the major, and perhaps dominant, economic player in the world. China’s ability to reach that potential will depend on its ability to create a legal system that is both globally respected and locally honored, capable of providing sufficient incentives to stimulate entrepreneurial efforts from within and sufficient security to encourage investment and commerce from without. Such a system does not exist today in China, and the challenges to its creation are substantial.

In May of 2000, I had the opportunity to join a nine-member team of lawyers from the United States to launch the first “American Lawyers in China” program, sponsored by Global

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Volunteers and hosted by the Sino-American Society. Our team spent two weeks in central China, in the city of Xi'an. We had unprecedented access, at both the highest and broadest levels, to legal professionals in the Shaanxi Province, of which Xi'an is a part.

In this article, I have recorded my perceptions of our team's observations of the Chinese legal system. In Part II, I give an overview of our experience. In Part III, I give a brief review of Chinese legal history. In Part IV, I address the current state of China's legal system and in Part V, I identify the challenges facing a changing Chinese legal system.

II. OVERVIEW OF THE GLOBAL VOLUNTEERS VISIT

We met and exchanged information with the provincial vice chair and other provincial ministers; the chief justice and other justices of the High Court of Shaanxi Province; the chief judge and other judges of the District Court of Shaanxi Province (after observing a trial in session); faculty and law students at two law schools in Xi'an; and members of five separate law firms, some state-owned and others private cooperatives. We provided information on American law, through lectures, seminars and informal meetings around conference tables. We received several briefings on Chinese law, which demonstrated the differing perspectives of the provincial government, the judicial system, public and private attorneys and law faculty and students. To supplement our legal exchange with cultural experiences, we conducted conversational English sessions with college and law school students on a wide range of subjects. We also visited the Banpo Neolithic Village Museum, the Terra Cotta Soldier Museum and the Huxian Peasant Painter's Exhibition Hall, providing a complete circle from the present to ancient history and back.

Although we accumulated an enormous amount of information about the Chinese legal system over those two weeks of discussions, our education was perhaps more anecdotal than systematic, leading to an appreciation of the complexity of the situation, if not a complete grasp of its intricacies and interconnections.

It is, of course, difficult for American lawyers to imagine that a successful Chinese legal system might look significantly different than our own. For the past century, western business, buttressed by the Euro-American legal system, has largely driven the world

economy. One seemingly simple solution for China is to model its legal system after that of the United States, or at least that of the western world. Some attempts to do just that were made in China during the last century. None were successful in integrating western legal concepts with Chinese tradition and culture before they were swept out of existence by the Communist revolution, particularly during the Cultural Revolution.

Current reform efforts in China have begun again the process of seeking a legal system that could integrate both local and global interests and requirements. It seems wise that the Chinese government is moving so cautiously, in incremental steps, because of the fundamental tension that exists between the conception of the individual in Chinese culture and the conception of the individual in western law. At the risk of great over-simplification, the comparison is this: while the foundation of western law (and western culture) is the guarantee of individual rights, which are to be pursued within the framework of a protective legal system, the focus of Chinese legal tradition is not on individual rights but individual virtues, which are to be cultivated through the performance of duties defined by a hierarchy of relationships to family, friends, community and government.¹ From this significantly different starting point, Chinese legal traditions have relied more on customs, rites and norms—the rule of social harmony—than on the rule of law.²

It is thus ironic that, while China has one of the world's oldest continuous civilizations, stretching back perhaps 5,000 years, it also has one of the world's most underdeveloped and immature legal systems, due both to the conflict between social traditions and the function of law, and to the major political upheavals in the nation during the twentieth century.

III. MILESTONES IN CHINESE LEGAL HISTORY

It is perhaps helpful, in order to understand the challenge to the development of a world-class Chinese legal system, to look at its history. From as early as 3000 B.C., and continuing until the turn

1. Herbert H.P. Ma, *The Chinese Concept of the Individual and the Reception of Foreign Law*, 9 J. CHINESE L. 207, 210-11 (1995).

2. *Id.* at 214; Robb M. LaKritz, Comment, *Taming a 5,000 Year-Old Dragon: Toward a Theory of Legal Revolution in Post-Mao China*, 11 EMORY INT'L L. REV. 237, 242-43 (1997).

of the last century, China was isolated from the rest of the world. It was ruled by a series of family dynasties, each making its own particular mark on culture and tradition, but generally maintaining some balance in its legal system between Confucianism and legalism. Confucianism espoused that social order was maintained by informal law through norms, rites and obligations. Virtue, the natural order of things, family and social harmony were the primary values. These were to be achieved through a feudal-like hierarchy, where each person understood his or her role in a complex set of defined relationships.³ Conflict resolution was undertaken through mediation, with community harmony being more greatly valued than individual rights or concepts of fairness.

As various dynasties evolved, a legalist school emerged, which proposed that order be maintained by more formal laws, using a balance of reward and punishment to constrain the self-interest of individuals.⁴ Some legal codes were adopted, but Confucianist thought continued to predominate and was embodied in the traditions and mores of families and communities spread throughout the vast nation.

The first western influences on China began to appear in the early 1900s. In 1903, under the Qing Dynasty, law schools were opened for the first time and law codification efforts were undertaken.⁵ Court systems were established and were given some independence.⁶ These efforts were modeled after European legal systems, which were either imposed upon the Chinese by foreign powers or were intended as a sign that China wished to participate in the world economy.⁷

In 1911, Sun Yet Sen forged an alliance between the nationalists and communists to overthrow the Qing Dynasty. Some modest principles of democracy were imported into the national structure. The process of importing western-style economic laws continued. In 1925, Chiang Kai-Shek ousted the communists, triggering Mao Zedong's "Long March," and the process of importing western laws perhaps increased. However, commentators suggest that while western laws were enacted, they

3. LaKritz, *supra* note 3, at 243.

4. *Id.* at 244-45.

5. *Id.* at 248.

6. *Id.*

7. *Id.* at 248-49.

were not effectively implemented or enforced.

In 1949, the communist revolution led by Mao Zedong overthrew the Republic of China and formed the People's Republic of China. Such European laws as had been adopted were initially replaced with Soviet codes.⁸ A process of deconstruction of Confucian virtues and reconstruction with socialist virtues was begun. By 1956, there was a break with the Soviet Union, which led to a retreat to a more imperial style of authoritarianism, by which law was seen as an instrument to carry out the policies that were continuously evolved and revised by the Chinese Communist Party.⁹

A major turn occurred in 1966, when the cultural revolution included reform of the legal system to decrease formality and to reflect anti-professionalism. Social order was maintained by the structures of the Communist Party and rules and regulations were dictated by the party and administered by party committees. There were virtually no published laws. Law schools were closed, the judicial system dismantled and members of the legal profession were re-educated to pursue other occupations.¹⁰

IV. CHINA'S LEGAL SYSTEM TODAY

With Mao's death in 1978, and growing awareness of the economic disparity between the Chinese people and the rest of Asia, a new legal reform effort began. It has been cautious, incremental and sensitive to the failures of the past.

Some aspects of this reform could be accomplished rapidly, given that legislative action is efficient in a single-party state. Thus, the People's Republic of China adopted a new constitution, which provided some limited individual rights in a framework designed to open China to the world economy. Over the last two decades, the People's Congress has enacted basic, foundational legislation to enable economic development, including a Company Act that permits some forms of private ownership and enterprise; a Contract Act that offers a framework for business transactions more familiar to foreign interests; a Civil Law Process Act to provide, at least theoretically, a structure for enforcement of rights and obligations; a Criminal Code; and an Intellectual Property/Patent

8. *Id.* at 250.

9. *Id.* at 250-51.

10. *Id.* at 251.

Act.¹¹ Taken as a whole, these laws reflect a careful move from a planned economy to some participation in a market economy.

As in past reform efforts, the implementation of this legislation was not self-executing. In fact, the elimination of the professional infrastructure of lawyers and judges during the cultural revolution took China back to square one in terms of the legal system that would be necessary to fulfill its legislative goals.

Law schools have now reopened across the country, and there is a concerted effort to produce new lawyers rapidly. A law degree can generally be obtained as a part of a four-year bachelor's degree. Official statistics report that there are about 150,000 lawyers in China, serving a population of 1.2 billion, or something akin to one lawyer per 8,000 in the population.¹² This number compares dramatically to the one million lawyers in the United States, representing about one lawyer for every 300 in the population. Moreover, an anecdotal impression from travels in China would suggest that the statistic of 150,000 lawyers in China may be over estimated. We were told that Shaanxi Province had only about 1,000 lawyers for a population of 35 million, or one lawyer per 35,000 citizens.

Of course it takes time to graduate new lawyers from these newly established law schools, and more time still for these new lawyers to obtain seasoning and sophistication in the practice. Thus, there is a significant lag in the establishment, growth and effectiveness of law firms, and a greater lag in the acquisition of sufficient experience to provide sound counseling on complex matters. Official statistics estimate that there are about 8,000 law firms currently established in China.¹³ Under the communist structure, most law firms are state owned, but some are organized as cooperatives by those lawyers with particular entrepreneurial spirit.¹⁴ The Chinese concept of a cooperative is complex, but the relationship between the members of those cooperative firms that we visited seemed quite comparable to law partnerships in America. The demographics, of course, are striking. The oldest lawyer we

11. Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty years*, 20 NW. J. INT'L L. & BUS. 383, 386-87 (2000).

12. *Id.* at 389.

13. *China: Lawyers Serve Clients Better*, CHINA DAILY, Feb. 2, 1998, available at 1998 WL 7593991 (stating that "[a]ccording to ministry statistics, there were 8,300 law firms in china at the end of 1997 employing more than 100,000 lawyers . . .").

14. Lubman, *supra* note 12, at 389.

met in Xi'an, who was reported to be the senior lawyer in the province, was about fifty-five years old. His colleagues in the cooperative law firm appeared to average between twenty-five and thirty years in age.

Efforts have been made to re-establish and expand the judiciary. Because there have been so few lawyers, most judges do not have a law degree, but have been appointed to their position from a post in the communist party or in the military.¹⁵ On-the-job judicial training is provided and it is reported that most judges are quite conscientious and take their positions seriously. It will take several years before the ranks of judges are filled by lawyers, however.

Some national statistics exist on the question of whether the Chinese population will use their court system to resolve issues. There apparently still exist many forms of community-based mediation that remain more popular than resorting to the court system. Culturally, Chinese still regard the bringing of a dispute to court as a disruption of harmony and as being overly aggressive. However, official statistics indicate that cases heard in provincial courts have increased, from 2.4 million in 1990 to almost six million in 1997.¹⁶

The court structure is quite simple and integrated, with four levels: the highest court and the court of last resort is the Supreme Court of the People's Republic of China.¹⁷ Within each province, in descending order of authority, are the High Court, the Intermediate Court and the District Court.

Of course, the position of the judiciary in a Communist government is significantly different than in America. In China, there is no separation of powers and the judiciary is not regarded as an independent, third branch. Instead, all power is centralized in and emanates from the Peoples Congress and both the executive and judicial functions are subordinate to that Congress. This has serious implications for the independence of the judiciary.

V. THE CHALLENGES FACING THE CHINESE LEGAL SYSTEM

There are numerous challenges facing the Chinese as they

15. *Id.* at 397.

16. *Id.* at 387.

17. *Id.*

move to create a viable and integrated legal system. At the center of these challenges lies the fundamental conflict between Chinese traditions and the demand for a more world-friendly system. The key challenges, from the perspective of an outsider, appear to be the following:

A. Legislative Ambiguity

Although China has enacted the necessary laws to provide a structure for participation in the market economy, the Chinese style of legislation is imprecise and general. Legislation has been drafted with flexibility, leaving room for changing interpretations.¹⁸ Without a tradition of rule of law, or independent courts, there is no clearly established system for interpreting the laws. It is generally seen that the agencies of the government interpret the laws applicable to their responsibilities, adopt their own rules to implement those laws and have final say in the interpretation of their rules.¹⁹ Courts cannot supercede that interpretation, but are only used to enforce the rules as interpreted by the agency.²⁰ Also, there are many sources of legislation, including the People's National Congress, provincial governments, local units and multiple administrative agencies.

B. Limited Judicial Autonomy

There is no tradition of an independent judiciary and the function and role of judges is slowly evolving. Currently, because judges are not trained in the law, they naturally maintain loyalties to where they came from, either a party function or the military.²¹ It is expected that judges will follow the policies announced by the communist party or any of its functioning units.²² It is also reported that ex-parte influences on judicial decision-making is expected, not prohibited. High-ranking party officials may direct the course of a judicial decision. Judges are expected to consult across the levels of a court system, and thus a district court judge may receive

18. *Id.* at 390-91

19. *Id.* at 391.

20. Lubman, *supra* note 12, at 390.

21. *Id.* at 397.

22. *Id.* at 395 (stating that "the principal affairs of the court are directed by the Party organization within the court. . .").

direct guidance from an intermediate court judge or high court justice while the case is still before the district court. Where a case has particular significance, or where the district court judge fears reversal, the case may be transferred to the next level prior to reaching any decision. Even after a decision, however, the appeal to the next level does not give deference to the decision, but results in a trial *de novo*. Finally, there is no firmly rooted concept of finality for judgments of the court. Any case may be reopened within two years after the judgment for the simple purpose of reconsidering the merits of the decision.

C. Complex Property Issues

Under a communist government, all real property is owned by the state. This is clearly true of land in China, which is owned by the government and can be used by private parties only through a complex system of leases. We were told that an individual could not obtain a lease for property, either for commercial or residential purposes, and that leases typically only go to developers who will construct either multiple residential units or commercial properties. We understood that the typical term of a commercial lease is forty years and a residential lease is seventy years. Obviously, this system imposes significant obstacles to growth and development. On the other hand, while in China, we were told that one half of the construction cranes in the world are now located and operating in China. Standing in either Beijing or Xi'an, one can confirm this visually.

D. Undefined Role of Attorneys

Of course, there is little history in the legal profession, and few traditions to draw upon, in defining the role of attorneys with respect to clients, courts, and their colleagues. We were given to understand that less than one half of the parties involved in court cases are represented by an attorney. Further, the degree of representation has become a very sensitive issue. There is no tradition of zealous advocacy. To the contrary, aggressive argument, raising of issues and propounding of rights, is viewed as being impolite. While our team was in China, a newly graduated lawyer, who had been dispatched by his law firm to defend a criminal case in a distant rural area, was arrested and jailed when

he appeared for the first day of trial. He was charged with “illegally obtaining evidence.” The attorney had interviewed dozens of witnesses, many of whom he had expected to call during the trial. He was detained for five months and was disqualified from practice based upon his resulting criminal record.

Despite these challenges, the Chinese law students, lawyers and judges that we met are encouraged, enthusiastic and hopeful. They focus upon the enormous opportunities and do not dwell unduly on the restrictions.

VI. CONCLUSION

The experience of participating on this lawyer team leaves one to reflect profoundly on the great accomplishments of the American legal system, the importance of the rule of law, the integrity of the judiciary and the privileges of advocacy. Echoing the sentiments of former Minnesota Supreme Court Chief Justice A. M. Keith, the delegation head of our lawyer team: “I believe that the more we learn about other cultures, the more we learn about ourselves and the deepest yearnings of our souls to connect with each other.” The following excerpts from a poetic gift made to our team (the 50th Global Volunteers team in Xi’an) by one of our hosts, demonstrates that the connection works both ways:

TO FLYERS²³

For the Fifty Teams of American Global Volunteers

*Flying,
You get across the Pacific
Over billows and billows,
And then gather here
At the city of Xi’an
The home of dragon.*

*50 times and back
you have been flying tirelessly*

²³ Zhu Mo, (May 18, 2000) (on file with author).

*in the sunshine
with the message of the other world.
You refresh our vision
And enlighten our mind.*

*Sometimes
You fly in a low position and say
That you are just learners.
But more often than not
You fly higher than ever
With the freshening breeze and rain.
From America and Europe
You land on an old tree branch
And under it you set a new home.*

*You are good cooperators,
Like our family members
Who nourish the youngsters
With passion and patience
And teach them to speak
With wisdom and love.*

*Perhaps
You fly this time away
And never come back.*

*But among you there are some people
Who come back twice or three times more,
To this place poor and bare,
To this place for quiet and peace.
You come from the New Continent on the other side
And arrive at a place where the Snows once worked,
A place myths and folklore grow*

And the Orient where the sun rises.

*You are a group good at flying,
Knowing well about the weather
Rain or shine
Between the earth and the sky,
Between China and the world,
And know yourselves
To be known.*

*I am an admirer of flying,
Of the flying style,
And therefore I admire you
Global volunteers
My dear friends.*